

§ 240.14a-3

17 CFR Ch. II (4-1-02 Edition)

contested solicitation for the election of directors;

(vii) Any person who receives compensation from an ineligible person directly related to the solicitation of proxies, other than pursuant to § 240.14a-13;

(viii) Where the registrant is an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.), an “interested person” of that investment company, as that term is defined in section 2(a)(19) of the Investment Company Act (15 U.S.C. 80a-2);

(ix) Any person who, because of a substantial interest in the subject matter of the solicitation, is likely to receive a benefit from a successful solicitation that would not be shared pro rata by all other holders of the same class of securities, other than a benefit arising from the person’s employment with the registrant; and

(x) Any person acting on behalf of any of the foregoing.

(2) Any solicitation made otherwise than on behalf of the registrant where the total number of persons solicited is not more than ten;

(3) The furnishing of proxy voting advice by any person (the “advisor”) to any other person with whom the advisor has a business relationship, if:

(i) The advisor renders financial advice in the ordinary course of his business;

(ii) The advisor discloses to the recipient of the advice any significant relationship with the registrant or any of its affiliates, or a security holder proponent of the matter on which advice is given, as well as any material interests of the advisor in such matter.

(iii) The advisor receives no special commission or remuneration for furnishing the proxy voting advice from any person other than a recipient of the advice and other persons who receive similar advice under this subsection; and

(iv) The proxy voting advice is not furnished on behalf of any person soliciting proxies or on behalf of a participant in an election subject to the provisions of Rule 14a-11; and

(4) Any solicitation in connection with a roll-up transaction as defined in Item 901(c) of Regulation S-K (§229.901

of this chapter) in which the holder of a security that is the subject of a proposed roll-up transaction engages in preliminary communications with other holders of securities that are the subject of the same limited partnership roll-up transaction for the purpose of determining whether to solicit proxies, consents, or authorizations in opposition to the proposed limited partnership roll-up transaction; *provided, however*, that:

(i) This exemption shall not apply to a security holder who is an affiliate of the registrant or general partner or sponsor; and

(ii) This exemption shall not apply to a holder of five percent (5%) or more of the outstanding securities of a class that is the subject of the proposed roll-up transaction who engages in the business of buying and selling limited partnership interests in the secondary market unless that holder discloses to the persons to whom the communications are made such ownership interest and any relations of the holder to the parties of the transaction or to the transaction itself, as required by § 240.14a-6(n)(1) and specified in the Notice of Exempt Preliminary Roll-up Communication (§240.14a-104). If the communication is oral, this disclosure may be provided to the security holder orally. Whether the communication is written or oral, the notice required by § 240.14a-6(n) and § 240.14a-104 shall be furnished to the Commission.

(Secs. 12, 13, 14, 15(d), 23(a), 48 Stat. 892, 894, 895, 901; secs. 1, 3, 8, 49 Stat. 1375, 1377, 1379; sec. 203(a), 49 Stat. 704; sec. 202, 68 Stat. 686; secs. 3, 4, 5, 6, 78, Stat. 565-568, 569, 570-574; secs. 1, 2, 3, 82 Stat. 454, 455, secs. 28(c), 1, 2, 3-5, 84 Stat. 1435, 1497; secs. 10, 18, 89 Stat. 119, 155; sec. 308(b), 90 Stat. 57; sec. 204, 91 Stat. 1500; 15 U.S.C. 78l, 78m, 78n, 78o(d))

[44 FR 68769, Nov. 29, 1979, as amended at 51 FR 42059, Nov. 20, 1986; 52 FR 21936, June 10, 1987; 57 FR 48290, Oct. 22, 1992; 59 FR 63684, Dec. 8, 1994; 65 FR 65749, Nov. 2, 2000]

§ 240.14a-3 Information to be furnished to security holders.

(a) No solicitation subject to this regulation shall be made unless each person solicited is concurrently furnished or has previously been furnished with a publicly-filed preliminary or definitive written proxy statement containing the information specified in

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Schedule 14A (§240.14a-101) or with a preliminary or definitive written proxy statement included in a registration statement filed under the Securities Act of 1933 on Form S-4 or F-4 (§239.25 or §239.34 of this chapter) or Form N-14 (§239.23) and containing the information specified in such Form.

(b) If the solicitation is made on behalf of the registrant, other than an investment company registered under the Investment Company Act of 1940, and relates to an annual (or special meeting in lieu of the annual) meeting of security holders, or written consent in lieu of such meeting, at which directors are to be elected, each proxy statement furnished pursuant to paragraph (a) of this section shall be accompanied or preceded by an annual report to security holders as follows:

NOTE TO SMALL BUSINESS ISSUERS—A “small business issuer,” defined under Rule 12b-2 of the Exchange Act (§240.12b-2), shall refer to the disclosure items in Regulation S-B (§228.10–702 of this chapter) rather than Regulation S-K (§229.10–702 of this chapter). If there is no comparable disclosure item in Regulation S-B, a small business issuer need not provide the information requested. A small business issuer shall provide the information in Item 310(a) of Regulation S-B in lieu of the financial information required by Rule 14a-3(b)(1) (§240.14a-3(b)(1)). Small business issuers using the transitional small business issuers disclosure format in the filing of their most recent annual report on Form 10-KSB (§249.310b of this chapter) need not provide the information specified below. Rather, those small business issuers shall provide only the financial statements required to be filed in their most recent Form 10-KSB. The inclusion of additional information, including information required of non-transitional small business issuers, in the annual report to security holders will not cause the issuer to be ineligible for the transitional disclosure forms.

(1) The report shall include, for the registrant and its subsidiaries consolidated, audited balance sheets as of the end of each of the two most recent fiscal years and audited statements of income and cash flows for each of the three most recent fiscal years prepared in accordance with Regulation S-X (part 210 of this chapter), except that the provisions of Article 3 (other than §§210.3-03(e), 210.3-04 and 210.3-20) and Article 11 shall not apply. Any financial statement schedules or exhibits or

separate financial statements which may otherwise be required in filings with the Commission may be omitted. If the financial statements of the registrant and its subsidiaries consolidated in the annual report filed or to be filed with the Commission are not required to be audited, the financial statements required by this paragraph may be unaudited.

NOTE 1—If the financial statements for a period prior to the most recently completed fiscal year have been examined by a predecessor accountant, the separate report of the predecessor accountant may be omitted in the report to security holders provided the registrant has obtained from the predecessor accountant a reissued report covering the prior period presented and the successor accountant clearly indicates in the scope paragraph of his report (a) that the financial statements of the prior period were examined by other accountants, (b) the date of their report, (c) the type of opinion expressed by the predecessor accountant and (d) the substantive reasons therefor, if it was other than unqualified. It should be noted, however, that the separate report of any predecessor accountant is required in filings with the Commission. If, for instance, the financial statements in the annual report to security holders are incorporated by reference in a Form 10-K and Form 10-KSB, the separate report of a predecessor accountant shall be filed in Part II or in Part IV as a financial statement schedule.

NOTE 2—For purposes of complying with §240.14a-3, if the registrant has changed its fiscal closing date, financial statements covering two years and one period of 9 to 12 months shall be deemed to satisfy the requirements for statements of income and cash flows for the three most recent fiscal years.

(2)(i) Financial statements and notes thereto shall be presented in roman type at least as large and as legible as 10-point modern type. If necessary for convenient presentation, the financial statements may be in roman type as large and as legible as 8-point modern type. All type shall be leaded at least 2 points.

(ii) Where the annual report to security holders is delivered through an electronic medium, issuers may satisfy legibility requirements applicable to printed documents, such as type size and font, by presenting all required information in a format readily communicated to investors.

(3) The report shall contain the supplementary financial information required by item 302 of Regulation S-K (§ 229.302 of this chapter).

(4) The report shall contain information concerning changes in and disagreements with accountants on accounting and financial disclosure required by Item 304 of Regulation S-K (§ 229.304 of this chapter).

(5)(i) The report shall contain the selected financial data required by Item 301 of Regulation S-K (§ 229.301 of this chapter).

(ii) The report shall contain management's discussion and analysis of financial condition and results of operations required by Item 303 of Regulation S-K (§ 229.303 of this chapter) or, if applicable, a plan of operation required by Item 303(a) of Regulation S-B (§ 228.303(a) of this chapter).

(iii) The report shall contain the quantitative and qualitative disclosures about market risk required by Item 305 of Regulation S-K (§ 229.305 of this chapter).

(6) The report shall contain a brief description of the business done by the registrant and its subsidiaries during the most recent fiscal year which will, in the opinion of management, indicate the general nature and scope of the business of the registrant and its subsidiaries.

(7) The report shall contain information relating to the registrant's industry segments, classes of similar products or services, foreign and domestic operations and exports sales required by paragraphs (b), (c)(1)(i) and (d) of Item 101 of Regulation S-K (§ 229.101 of this chapter).

(8) The report shall identify each of the registrant's directors and executive officers, and shall indicate the principal occupation or employment of each such person and the name and principal business of any organization by which such person is employed.

(9) The report shall contain the market price of and dividends on the registrant's common equity and related security holder matters required by Item 201(a), (b) and (c) of Regulation S-K (§ 229.201(a), (b) and (c) of this chapter).

(10) The registrant's proxy statement, or the report, shall contain an

undertaking in bold face or otherwise reasonably prominent type to provide without charge to each person solicited upon the written request of any such person, a copy of the registrant's annual report on Form 10-K and Form 10-KSB, including the financial statements and the financial statement schedules, required to be filed with the Commission pursuant to Rule 13a-1 under the Act for the registrant's most recent fiscal year, and shall indicate the name and address (including title or department) of the person to whom such a written request is to be directed. In the discretion of management, a registrant need not undertake to furnish without charge copies of all exhibits to its Form 10-K and Form 10-KSB provided that that copy of the annual report on Form 10-K and Form 10-KSB furnished without charge to requesting security holders is accompanied by a list briefly describing all the exhibits not contained therein and indicating that the registrant will furnish any exhibit upon the payment of a specified reasonable fee which fee shall be limited to the registrant's reasonable expenses in furnishing such exhibit. If the registrant's annual report to security holders complies with all of the disclosure requirements of Form 10-K and Form 10-KSB and is filed with the Commission in satisfaction of its Form 10-K and Form 10-KSB filing requirements, such registrant need not furnish a separate Form 10-K and Form 10-KSB to security holders who receive a copy of such annual report.

NOTE: Pursuant to the undertaking required by paragraph (b)(10) of this section, a registrant shall furnish a copy of its annual report on Form 10-K and Form 10-KSB (§ 249.310 of this chapter) to a beneficial owner of its securities upon receipt of a written request from such person. Each request must set forth a good faith representation that, as of the record date for the solicitation requiring the furnishing of the annual report to security holders pursuant to paragraph (b) of this section, the person making the request was a beneficial owner of securities entitled to vote.

(11) Subject to the foregoing requirements, the report may be in any form deemed suitable by management and the information required by paragraphs (b)(5) to (10) of this section may be presented in an appendix or other separate section of the report, provided that the

attention of security holders is called to such presentation.

NOTE: Registrants are encouraged to utilize tables, schedules, charts and graphic illustrations of present financial information in an understandable manner. Any presentation of financial information must be consistent with the data in the financial statements contained in the report and, if appropriate, should refer to relevant portions of the financial statements and notes thereto.

(12) [Reserved]

(13) Paragraph (b) of this section shall not apply, however, to solicitations made on behalf of the registrant before the financial statements are available if a solicitation is being made at the same time in opposition to the registrant and if the registrant's proxy statement includes an undertaking in bold face type to furnish such annual report to all persons being solicited at least 20 calendar days before the date of the meeting or, if the solicitation refers to a written consent or authorization in lieu of a meeting, at least 20 calendar days prior to the earliest date on which it may be used to effect corporate action.

(c) Seven copies of the report sent to security holders pursuant to this rule shall be mailed to the Commission, solely for its information, not later than the date on which such report is first sent or given to security holders or the date on which preliminary copies, or definitive copies, if preliminary filing was not required, of solicitation material are filed with the Commission pursuant to Rule 14a-6, whichever date is later. The report is not deemed to be "soliciting material" or to be "filed" with the Commission or subject to this regulation otherwise than as provided in this Rule, or to the liabilities of section 18 of the Act, except to the extent that the registrant specifically requests that it be treated as a part of the proxy soliciting material or incorporates it in the proxy statement or other filed report by reference.

(d) An annual report to security holders prepared on an integrated basis pursuant to General Instruction H to Form 10-K and Form 10-KSB (§249.310) may also be submitted in satisfaction of this rule. When filed as the annual report on Form 10-K and Form 10-KSB, responses to the Items of that form are subject to section 18 of the Act not-

withstanding paragraph (c) of this section.

(e)(1)(i) A registrant will be considered to have delivered an annual report or proxy statement to all security holders of record who share an address if:

(A) The registrant delivers one annual report or proxy statement, as applicable, to the shared address;

(B) The registrant addresses the annual report or proxy statement, as applicable, to the security holders as a group (for example, "ABC Fund [or Corporation] Security Holders," "Jane Doe and Household," "The Smith Family"), to each of the security holders individually (for example, "John Doe and Richard Jones") or to the security holders in a form to which each of the security holders has consented in writing;

NOTE TO PARAGRAPH (e)(1)(i)(B): Unless the company addresses the annual report or proxy statement to the security holders as a group or to each of the security holders individually, it must obtain, from each security holder to be included in the householded group, a separate affirmative written consent to the specific form of address the company will use.

(C) The security holders consent, in accordance with paragraph (e)(1)(ii) of this section, to delivery of one annual report or proxy statement, as applicable;

(D) With respect to delivery of the proxy statement, the registrant delivers, together with or subsequent to delivery of the proxy statement, a separate proxy card for each security holder at the shared address; and

(E) The registrant includes an undertaking in the proxy statement to deliver promptly upon written or oral request a separate copy of the annual report or proxy statement, as applicable, to a security holder at a shared address to which a single copy of the document was delivered.

(ii) *Consent.* (A) *Affirmative written consent.* Each security holder must affirmatively consent, in writing, to delivery of one annual report or proxy statement, as applicable. A security holder's affirmative written consent will only be considered valid if the security holder has been informed of:

(1) The duration of the consent;

(2) The specific types of documents to which the consent will apply;

(3) The procedures the security holder must follow to revoke consent; and

(4) The registrant's obligation to begin sending individual copies to a security holder within thirty days after the security holder revokes consent.

(B) *Implied consent.* The registrant need not obtain affirmative written consent from a security holder for purposes of paragraph (e)(1)(ii)(A) of this section if all of the following conditions are met:

(1) The security holder has the same last name as the other security holders at the shared address or the registrant reasonably believes that the security holders are members of the same family;

(2) The registrant has sent the security holder a notice at least 60 days before the registrant begins to rely on this section concerning delivery of annual reports and proxy statements to that security holder. The notice must:

(i) Be a separate written document;

(ii) State that only one annual report or proxy statement, as applicable, will be delivered to the shared address unless the registrant receives contrary instructions;

(iii) Include a toll-free telephone number, or be accompanied by a reply form that is pre-addressed with postage provided, that the security holder can use to notify the registrant that the security holder wishes to receive a separate annual report or proxy statement;

(iv) State the duration of the consent;

(v) Explain how a security holder can revoke consent;

(vi) State that the registrant will begin sending individual copies to a security holder within thirty days after the security holder revokes consent; and

(vii) Contain the following prominent statement, or similar clear and understandable statement, in bold-face type: "Important Notice Regarding Delivery of Security Holder Documents." This statement also must appear on the envelope in which the notice is delivered. Alternatively, if the notice is delivered separately from other communications to security holders, this statement may appear either on the notice or on

the envelope in which the notice is delivered.

NOTE TO PARAGRAPH (e)(1)(ii)(B)(2): The notice should be written in plain English. See § 230.421(d)(2) of this chapter for a discussion of plain English principles.

(3) The registrant has not received the reply form or other notification indicating that the security holder wishes to continue to receive an individual copy of the annual report or proxy statement, as applicable, within 60 days after the registrant sent the notice; and

(4) The registrant delivers the document to a post office box or residential street address.

NOTE TO PARAGRAPH (e)(1)(ii)(B)(4): The registrant can assume that a street address is residential unless the registrant has information that indicates the street address is a business.

(iii) *Revocation of consent.* If a security holder, orally or in writing, revokes consent to delivery of one annual report or proxy statement to a shared address, the registrant must begin sending individual copies to that security holder within 30 days after the registrant receives revocation of the security holder's consent.

(iv) *Definition of address.* Unless otherwise indicated, for purposes of this section, address means a street address, a post office box number, an electronic mail address, a facsimile telephone number or other similar destination to which paper or electronic documents are delivered, unless otherwise provided in this section. If the registrant has reason to believe that the address is a street address of a multi-unit building, the address must include the unit number.

NOTE TO PARAGRAPH (e)(1): A person other than the registrant making a proxy solicitation may deliver a single proxy statement to security holders of record or beneficial owners who have separate accounts and share an address if: (a) the registrant or intermediary has followed the procedures in this section; and (b) the registrant or intermediary makes available the shared address information to the person in accordance with § 240.14a-7(a)(2)(i) and (ii).

(2) Notwithstanding paragraphs (a) and (b) of this section, unless state law requires otherwise, a registrant is not

required to send an annual report or proxy statement to a security holder if:

(i) An annual report and a proxy statement for two consecutive annual meetings; or

(ii) All, and at least two, payments (if sent by first class mail) of dividends or interest on securities, or dividend reinvestment confirmations, during a twelve month period, have been mailed to such security holder's address and have been returned as undeliverable. If any such security holder delivers or causes to be delivered to the registrant written notice setting forth his then current address for security holder communications purposes, the registrant's obligation to deliver an annual report or a proxy statement under this section is reinstated.

(f) The provisions of paragraph (a) of this section shall not apply to a communication made by means of speeches in public forums, press releases, published or broadcast opinions, statements, or advertisements appearing in a broadcast media, newspaper, magazine or other bona fide publication disseminated on a regular basis, provided that:

(1) No form of proxy, consent or authorization or means to execute the same is provided to a security holder in connection with the communication; and

(2) At the time the communication is made, a definitive proxy statement is on file with the Commission pursuant to § 240.14a-6(b).

[39 FR 40768, Nov. 20, 1974]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 240.14a-3, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 240.14a-4 Requirements as to proxy.

(a) The form of proxy (1) shall indicate in bold-face type whether or not the proxy is solicited on behalf of the registrant's board of directors or, if provided other than by a majority of the board of directors, shall indicate in bold-face type on whose behalf the solicitation is made;

(2) Shall provide a specifically designated blank space for dating the proxy card; and

(3) Shall identify clearly and impartially each separate matter intended to be acted upon, whether or not related to or conditioned on the approval of other matters, and whether proposed by the registrant or by security holders. No reference need be made, however, to proposals as to which discretionary authority is conferred pursuant to paragraph (c) of this section.

Note to paragraph (a)(3) (Electronic filers): Electronic filers shall satisfy the filing requirements of Rule 14a-6(a) or (b) (§ 240.14a-6(a) or (b)) with respect to the form of proxy by filing the form of proxy as an appendix at the end of the proxy statement. Forms of proxy shall not be filed as exhibits or separate documents within an electronic submission.

(b)(1) Means shall be provided in the form of proxy whereby the person solicited is afforded an opportunity to specify by boxes a choice between approval or disapproval of, or abstention with respect to each separate matter referred to therein as intended to be acted upon, other than elections to office. A proxy may confer discretionary authority with respect to matters as to which a choice is not specified by the security holder provided that the form of proxy states in bold-face type how it is intended to vote the shares represented by the proxy in each such case.

(2) A form of proxy which provides for the election of directors shall set forth the names of persons nominated for election as directors. Such form of proxy shall clearly provide any of the following means for security holders to withhold authority to vote for each nominee:

(i) A box opposite the name of each nominee which may be marked to indicate that authority to vote for such nominee is withheld; or

(ii) An instruction in bold-face type which indicates that the security holder may withhold authority to vote for any nominee by lining through or otherwise striking out the name of any nominee; or

(iii) Designated blank spaces in which the security holder may enter the names of nominees with respect to whom the security holder chooses to withhold authority to vote; or